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The NLRB Waffling on *Weingarten* Rights

*Christine Neylon O'Brien**

The *Weingarten* right allows an employee to request the presence of a union representative, or in some instances a co-worker, at an employer's investigatory interview when the employee reasonably believes that the interview might lead to disciplinary action.¹ Both non-union employees and union employers may benefit from this right. For example, the presence of a witness elevates the level of concern for fairness both parties and places a non-manager in a position where he or she can provide substantiation during and after the interview. From the

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1. The right is generally thought to be based upon sections 7 and 8(a)(1), as well as, in some decisions, section 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1), 159(a) (2000); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975) (basing right on sections 7 and 8(a)(1)). Section 7 provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

National Labor Relations Act, 29 U.S.C. § 157. Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." National Labor Relations Act, 29 U.S.C. § 158(a)(1). Section 9(a) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

National Labor Relations Act, 29 U.S.C. § 159(a).

employee's point of view, a co-worker witness keeps the employer's nearly unfettered power somewhat in check. And from the employer's point of view, the witness could provide additional information regarding the incident in question and the names of other relevant parties, as well as serve as an employee-level witness to attest to the fairness of the questions asked, the answers given, and the process in general. If discipline is imposed, the co-worker witness may even support the employer's decision when queried by other co-workers in light of his or her first-hand knowledge of the proceedings.²

There are numerous situations parallel to the *Weingarten* right, within contexts as varied as the National Labor Relations Board's (NLRB or Board) representation election process to arbitral and litigation milieus, in which the law, due process, and logic have dictated the right for both parties to have some sort of witness, counselor, and/or advocate.³ Although the safeguard of a witness or representative for each side will not necessarily equalize the resources of the parties to a dispute or an investigatory interview, it will at least set a minimum of protection for the party with less power or resources.

The NLRB's representation election process provides an analogy to *Weingarten* witnesses. The Board allows employee observers at its secret ballot election process: one or more from the employer side and one or more for each union present on the ballot.⁴ These observers sit alongside the Board agent who runs the election as the employees cast their secret ballot votes.⁵ The observers essentially oversee the process to ensure that the Board's rules are followed and that laboratory conditions are maintained.⁶ Observers check that only eligible

2. The employee who is the subject of the interview may also be more likely to tell the truth regarding the incident in question in front of a co-worker than a manager, because a co-worker witness could more readily discover a lie than a manager. Co-workers may be more likely to share information with others at their own level outside of an interview, whereas they may be reluctant to discuss incriminating matters with a manager because of a sense of loyalty to the subject employee.

3. See generally DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW, 96-98 (2004) (regarding procedural rules prior to and during NLRB representation elections); NLRB Case Handling Manual Part II, 11300-11350 (regarding representation elections in general), 11310 (regarding rules concerning observers and their role in monitoring the election process as well as other material), available at <http://www.nlr.gov/nlr/legal/manuals/rules/part103.asp>.

4. NLRB Case Handling Manual, *supra* note 3.

5. *Id.*

6. Laboratory conditions ensure the fairness of the process of the election, modeled after the careful procedures used in a science laboratory. It is important to maintain these conditions in accordance with NLRB rules because otherwise one side might unduly interfere with employee free choice at the ballot box; that is, the choice whether to be represented by a union or not. Because the freedom to choose is guaranteed under Section 7 of the Act, the Board will set aside an election if the laboratory conditions were "polluted." Catherine L. Fisk, *Union Lawyers and*

employees vote in the election and that prohibited election conduct does not jeopardize the employees' freedom to select or not select a union as the majority bargaining representative.⁷ If the Board agent does not follow the Board's rules for a secret ballot election, or if the agent is unable to maintain the standards required because of the conduct of others, the observers act as witnesses to the facts, so that objections concerning the conduct of the election may be filed.⁸ The Board provides for these observers in the election process because it is fair for all sides to have the same access to information about the basic process used to determine who wins or loses the election.

In a similarly balanced manner, the boundaries set by *Weingarten* do not erode the employer's power to discipline employees; rather, they help protect the fairness of the investigative process. Section 7 of the National Labor Relations Act (NLRA or Act) provides for concerted activity such that employees may seek support from each other for mutual aid or protection, regardless of the present existence of a section 9(a) bargaining representative. Certainly, an investigatory interview that an employee reasonably believes may lead to his discipline is a setting where an employee would benefit from the mutual aid or protection of having a co-worker present.⁹

Congress did not design the NLRA to promote or discourage unions. This neutrality is evidenced throughout the statute, particularly in language from the latter part of section 7 that allows employees the right to refrain from engaging in concerted activities.¹⁰ The Board itself, through its regional offices, seeks to foster a policy of neutrality, favoring neither management nor unions, as it enforces the provisions of the Act.¹¹ When the United States Supreme Court first dealt with the

Employment Law, 23 BERKELEY J. EMP. & LAB. L. 57, 66 & n.40 (2002) (citing Gen. Shoe Corp., 77 N.L.R.B. 124 (1948)).

7. TWOMEY, *supra* note 3, at 96–97 and section 7 of the Act, 29 U.S.C. § 157 (2000); *see also supra* note 3 (regarding role of election observers).

8. During the election itself, the observers may challenge the eligibility of certain questionable voters, so that the Board agent places the challenged ballots into sealed envelopes that are only subject to evaluation or verification of eligibility if the number could affect the outcome of the election. *See* Memorandum of Richard A. Siegel, Associate General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (Jan. 31, 2005) (on file with author as memorandum OM 05-33) (containing revised instructions to election observers of the NLRB on Form NLRB-722).

9. As will be discussed, even when *Weingarten* rights exist, employers retain the right to refuse to go forward with an interview where the employee under investigation requests a witness. *See infra* Part II (describing those rights as laid out in the *Weingarten* decision).

10. *See supra* note 1 for language of section 7.

11. Interview with Robert S. Fuchs, then Regional Director for Region 1 of the NLRB, in Boston, Mass. (June 1977).

issue of *Weingarten* rights, the facts of the case involved a union setting.¹² However, section 7 rights apply to non-union environments as well, and a strong argument exists that *Weingarten* rights similarly apply in a non-union context. The NLRA is balanced, and its interpretation and enforcement should be equally even-handed.

Over the past twenty-three years, however, the NLRB has changed its position on whether *Weingarten* rights apply to non-union employees on four occasions. Most recently, the NLRB retracted *Weingarten* rights for non-union employees in its 2004 *IBM Corporation* decision.¹³ This change makes non-union employees more vulnerable than their organized counterparts and is especially important in light of the fact that the vast majority of American workplaces today lack union organization.¹⁴

The Board's vacillation on this issue over time reflects the ever-shifting composition of the five-member Board and its political makeup of presidential appointees.¹⁵ The *Weingarten* rulings that follow these political shifts leave the NLRB subject to criticism because it is unclear

12. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 254 (1975).

13. IBM Corp., 341 N.L.R.B. No. 148, 174 L.R.R.M. (BNA) 1537 (June 9, 2004); Susan J. McGolrick, *NLRB, Following Very Productive Year, NLRB Faces Significant Cases Awaiting Decision*, Daily Lab. Rep., BNA, Jan. 18, 2005 at S-11 (discussing the importance of the Board's 3-2 vote holding that non-union employees don't have the right to have a co-worker present at an investigatory interview that might lead to discipline).

14. The dissent in *IBM* noted that only 8.2 percent of employees in the private sector were organized as of 2003. *IBM Corp.*, 174 N.L.R.B. at 1556 n.9 (Liebman, J., dissenting) (citing U.S. Department of Labor, Bureau of Labor Statistics, "Union Members in 2003," News Release USDL 04-53 (Jan. 21, 2004)). Numbers for 2004 reflected further decline to 7.9 percent organized in the private sector. Accord John Sullivan, *Union Membership Rate Dropped in 2004 to 12.5 Percent, Continuing 20-Year Decline*, Daily Lab. Rep., BNA, Jan. 28, 2005 at AA-1 (describing the declining number of union employees). See also William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002). Professor Corbett discusses the importance of non-union employees' section 7 right to engage in concerted activity because it gives them voice to express their views and to obtain information, and he specifically mentions standing by each other in disciplinary interviews. *Id.* Corbett notes that the works of Professor Charles Morris support the view that there is a growing need for a broad interpretation of section 7 as the percent of unionized workers declines. *Id.* Professor Morris, along with others, petitioned the NLRB to use its rulemaking power to extend *Weingarten* rights to non-union employees. *Professors Seek Expansion of Employee Rights at Disciplinary Interview*, Daily Lab. Rep. (BNA) No. 242, (Dec. 17, 1996); Corbett, *supra* at 259-68.

15. As Judge Edwards noted in *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001): "It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board's new interpretation is reasonable under the Act, it is entitled to deference." See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that administrative implementation of a particular statutory provision qualifies for deference when it appears Congress delegated autonomy to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority).

whether they are supported by a rational decision-making process to which the federal courts of appeal should defer.¹⁶ In their opinions, Board members are apt to refer to barely defined, broad public policies, as well as to modern labor relations trends that are announced without support from hard research. In addition, they often use presumptions as a basis for overturning *Weingarten* precedent.¹⁷ As the political pendulum swings continuously back and forth on the issue of non-union workers' *Weingarten* rights, the American workplace never quite reaches equilibrium and the vast majority of American workers, namely unorganized employees, are unable to count on the valuable safeguard of the *Weingarten* right.

This article will review the origin and recent history of the *Weingarten* right, analyze the important labor management issues involved, and argue that the *Weingarten* right should apply equally to unionized and non-union employees.¹⁸ Part I of the article briefly outlines the NLRA as the statutory source for *Weingarten* rights.¹⁹ Part II provides a discussion of the history, holding, and limits set upon these rights in the United States Supreme Court's 1975 decision in *NLRB v. J. Weingarten, Inc.*²⁰ Part III reviews the subsequent administrative and judicial case history on the topic, illustrating the Board's flip-flopping regarding *Weingarten* rights for non-union workers, and leads up to the Board's most recent decisions on the issue.²¹ Part IV analyzes the Board's 2004 *IBM Corporation* decision that once again retracted the *Weingarten* right from non-union workers.²² Part V outlines two subsequent decisions by the Board that shed further light upon the Board's current position.²³ Part VI analyzes the reasoning behind, as

16. The NLRB's decisions are entitled to deference where supported by a rational interpretation of the Act. In *Epilepsy*, and in other decisions, the courts of appeals have upheld Board decisions regarding *Weingarten* rights as long as they are reasonable and permissible interpretations of the Act, and as long as the findings of fact are supported by substantial evidence on the record as a whole. See *Epilepsy*, 268 F.3d at 1098-99 (holding that the Court must affirm the NLRB's interpretation of the Act "unless it conflicts with the unambiguously expressed intent of Congress or is otherwise not a permissible construction of the statute").

17. See *IBM Corp.*, 174 L.R.R.M 1537, 1555-60 (2004) (Liebman, Member and Walsh, Member, dissenting) (discussing lack of empirical evidence supporting statements regarding policy considerations, and criticizing the Board's ruling).

18. *Infra* Parts I-VI.

19. See *infra* Part I (outlining the NLRA in connection with *Weingarten* rights).

20. See *infra* Part II (describing the history of *Weingarten*).

21. See *infra* Part III (discussing relevant cases relating to the *Weingarten* rights for non-unionized workers).

22. See *infra* Part V (focusing on the *IBM* decision).

23. See *infra* Part V (discussing decisions leading to the NLRB's current position).

well as the impact of, the Board's recent decisions.²⁴ Specifically, this article argues that the Board's decision to withdraw the right from non-union employees does not correspond with section 7 of the NLRA and sound Board precedent.²⁵ The article ultimately concludes that *IBM* represents a significant erosion of section 7 rights for non-union workers, an important loss in the present, predominantly non-union private sector. It is a significant loss because it precludes any guarantee of a modicum of due process prior to the imposition of what may be unjust discipline—discipline that is not necessarily illegal or actionable.

I. THE NATIONAL LABOR RELATIONS ACT

The NLRA (also known as the Wagner Act after its legislative sponsor), drew from section 7(a) of the National Industrial Recovery Act of 1933, but added significant authority to the new NLRB in the form of investigative powers and an ability to conduct secret ballot elections to enforce the substantive rights of employees under section 7 of the Act.²⁶ Pursuant to section 7, "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"²⁷ The secret ballot election was designed to avoid recognition strikes and labor unrest, and some of the unfair labor practice provisions were to prevent employer interference with section 7 rights.²⁸ The United States Supreme Court upheld the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Corp.*²⁹ The right to concerted activity under section 7 was liberally interpreted by the Supreme Court in *NLRB v. J. Weingarten, Inc.*³⁰

24. See *infra* Part VI (analyzing the Board's recent decisions).

25. Unionized employees generally have access to the counsel of their union representative and to a grievance and arbitration procedure as well as explicit protection from unjust discipline deriving from the collective bargaining agreement. They also may refuse to attend an investigatory interview that reasonably could lead to discipline without the presence of a union representative.

26. See TWOMEY, *supra* note 3, at 40 (noting that NLRA was not effective because it led to labor disputes).

27. 29 U.S.C. § 157 (2000).

28. TWOMEY, *supra* note 3, at 41.

29. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

30. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265–67 (1975) (interpreting the right to concerted activity).

II. THE UNITED STATES SUPREME COURT'S TOUCHSTONE *WEINGARTEN* DECISION -1975

In *NLRB v. J. Weingarten, Inc.*, the United States Supreme Court agreed with the NLRB that an employer's failure to grant an employee's request to have a union representative at an investigatory interview violated section 8(a)(1) of the NLRA by interfering with the employee's section 7 right to engage in concerted activities for mutual aid or protection.³¹ The Supreme Court held that the Board correctly construed the statute as providing this right to representation where the employee so requests. However, the Court also found that the Board appropriately limited the right to situations where the employee objectively has "reasonable" cause to believe the investigation could potentially result in disciplinary action.³² Under the protocol outlined in *Weingarten*, the employer need not bargain with a union representative who is permitted to attend an investigatory interview.³³ The Board viewed the representative as a potential source of additional information, available to assist with fact clarification or offer the names of other employees who may have relevant information, but noted that the employer could insist upon hearing only the employee's account.³⁴ Furthermore, the employer could simply proceed with its investigation without the interview, rather than permit the employee to have a representative.³⁵

The *Weingarten* case involved a retail store employee who was questioned by an employer security specialist and a store manager regarding suspected theft or underpayment for her lunch.³⁶ The employee's requests for a union representative at the interview were repeatedly denied. At what might have been the conclusion of the

31. *Id.* The Court reversed and remanded to the Court of Appeals to enforce a Board order that the employer cease and desist from requiring an employee to take part in an investigatory interview regarding the employee's suspected theft of food without her union representative. *Id.* Justice Brennan authored the opinion of the Court including six members: Justices Douglas, White, Marshall, Blackmun and Rehnquist. *Id.* Chief Justice Burger dissented, expressing concern that the NLRB had not sufficiently explained its departure from prior decisions. *Id.* at 268-69. Justices Powell and Stewart also dissented, noting that Congress left the right to union representation at investigatory interviews to the bargaining process, and that the right the Court announced in the *Weingarten* case was not among those that Congress intended to protect under section 7 since a personalized interview was not concerted activity. *Id.* at 275.

32. *Id.* at 257. Disciplinary action encompasses any change that would adversely impact the employee's working conditions or continued employment.

33. *Id.* at 259.

34. *Id.* at 260 (quoting Brief for Petitioner at 22, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (No. 73-1363)).

35. *Id.* at 258-59 (quoting *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 1052 (1972)).

36. *Id.* at 254.

interview, the employee burst into tears and noted that the only thing that she had received without payment “was her free lunch.”³⁷ The security specialist and store manager composed a written statement for her to sign including a calculation of the money that she owed the company for past lunches.³⁸ Thereafter, it was determined that the particular store’s policy regarding free lunch for lobby employees was uncertain and thus the matter was dropped.³⁹ Even though the store manager asked the employee not to discuss the matter with others, she reported the interview to her shop steward and unfair labor practice proceedings resulted.⁴⁰

The Supreme Court in *Weingarten* noted that the Board referred to its earlier decisions in *Quality Manufacturing Co.*⁴¹ and *Mobil Oil Corp.*⁴² for the contours and limits of the statutory right to refuse to submit, without union representation, to an interview that reasonably could lead to discipline.⁴³ The Court stated “[t]he right inheres in § 7’s guarantee of the right of employees to act in concert for mutual aid and protection.”⁴⁴ The Court quoted the following language from the Board’s decision in *Mobil Oil*:

[I]t is a serious violation of the employee’s individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee’s request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee’s right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.⁴⁵

The *Weingarten* Court saw an employee’s right to representation as an engagement in concerted activity for the purpose of mutual aid or protection, even though the immediate threat might only be towards that

37. *Id.* at 255.

38. *Id.*

39. *Id.* at 256.

40. *Id.*

41. *See id.* (citing *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972), considered in *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 277 (1975)).

42. 196 N.L.R.B. 1052 (1972).

43. *Weingarten*, 420 U.S. at 256.

44. *Id.* The NLRB sought enforcement of its order determining that the employer committed an unfair labor practice, whereupon the Court of Appeals for the Fifth Circuit denied enforcement, 485 F.2d 1135 (1973), and the Supreme Court granted certiorari, 416 U.S. 969 (1974). *Weingarten*, 420 U.S. at 253.

45. *Weingarten*, 420 U.S. at 258 (quoting *Mobil Oil Corp.*, 196 N.L.R.B. 1052).

one employee.⁴⁶ The Court concluded that “the Board’s holding was a permissible construction of concerted activities for . . . mutual aid or protection” and thus upheld the Board ruling.⁴⁷ The Court saw the action of seeking assistance in this context as falling within the “literal wording” of section 7.⁴⁸

The Court further deemed that only the just imposition of punishment, even on a single employee level, served the interests of the entire bargaining unit.⁴⁹ The Court therefore approved of the Board’s construction of the NLRA, noting that Congress designed the Act to eliminate the inequality of bargaining power inherent in the employer-employee relationship.⁵⁰ It made little sense to the Court to wait for union representation at the grievance and arbitration phase, where an employer “may then be more concerned with justifying his actions than re-examining them.”⁵¹ Instead, the Court found it far better to clarify the facts and the issues at the first instance, especially in cases where the employees’ “livelihood is at stake, [and they] might in fact need the more experienced kind of counsel which their union steward might represent.”⁵² The Court noted that the foreman might see the problem more clearly and that both parties might benefit from the presence of a steward’s experience and knowledge regarding the implications of the facts and the collective bargaining clause in question.⁵³ The Court also noted that the Board’s concern that the increase in sophisticated security techniques to monitor employee conduct in the workplace warranted a re-appraisal by the Board of its impact on statutory rights.⁵⁴ Employees may be both more apprehensive and more in need of experienced assistance in dealing with security specialists who may be strangers to the employees in question and trained in interrogation techniques.⁵⁵

46. *Id.* at 260–61.

47. *Id.* at 261.

48. *Id.*

49. *Id.* at 260–61

50. *Id.* at 262. The Court noted that “[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.” *Id.* at 262–63. The Court also noted that the safeguards of the Act were designed to “redress the perceived imbalance of economic power between labor and management.” *Id.* at 262 (citing *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965)).

51. *Id.* at 263–64.

52. *Id.* at 262 n.7 (quoting *Indep. Lock Co.*, 30 Lab. Arb. Rep. 744, 746 (1958)).

53. *Id.*

54. *Id.* at 264–65 & 265 n.10 (quoting Brief for Petitioner at 27 n.22, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (No. 73-136)).

55. *Id.* It is interesting to compare this rationale expressed in *Weingarten* to the rationale in support of the Board’s decision to withdraw *Weingarten* rights from non-union employees in *IBM*

The Supreme Court found that the Board's construction "in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section."⁵⁶ The Court did not bind the Board to its earlier decisions; rather, it permitted the Board to adapt the Act to changing patterns of industrial life based on its cumulative experience and insight.⁵⁷ The majority wrote that the Board's decision harmonized with and incorporated industrial practice and arbitral decisions regarding employee rights to union representation at investigatory interviews.⁵⁸

Several Justices dissented in *Weingarten*. Chief Justice Burger dissented, noting that the Court adopted a new rule and posited a new section 7 right without a reasoned explanation.⁵⁹ He would have remanded the case to the court of appeals with instructions to remand to the Board for justification of its change in policy.⁶⁰ Justice Powell, joined by Justice Stewart, also authored a dissent in *Weingarten*.⁶¹ In their view, Congress did not intend to protect the right announced by the Court under section 7, since "a personalized interview" is not "concerted activity," and the subject matter of "union participation in investigatory interviews is a standard topic of collective bargaining."⁶²

III. THE BOARD'S AMBIVALENCE TOWARDS *WEINGARTEN* RIGHTS FOR NON-UNION EMPLOYEES: FROM *MATERIALS RESEARCH* (1982) TO *EPILEPSY FOUNDATION* (2000)

After *Weingarten*, a number of further case developments represented an important prelude to analyzing the Board's current position. First, the Board extended *Weingarten* rights to non-union employees in the 1982 *Materials Research* case.⁶³ However, after *Materials Research*,

Corp. where the majority wrote about the changed work environment that has led to "ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence." *IBM Corp.*, 341 N.L.R.B. No. 148, 174 L.R.R.M. (BNA) 1537, 1540 (June 9, 2004). The actual facts in *IBM* involved the employer's confidential investigation of matters related to alleged harassment (not sexual) of a former contract employee, hardly a new concern since *Epilepsy Foundation* once again extended the right to non-union employees in 2000. *Epilepsy Found. v. NLRB*, 331 NLRB 676, 678 (2000), *enforced in relevant part*, 268 F.3d 1095, 1100 (D.C. Cir. 2001).

56. *Weingarten*, 420 U.S. at 265.

57. *Id.* at 265-67. The Court stated that the Board's construction of the Act was "at least permissible under it." *Id.*

58. *Id.* at 267.

59. *Id.* at 268-69 (Burger, C.J., dissenting).

60. *Id.* at 269.

61. *Id.*

62. *Id.* at 275 (Powell, J., dissenting) (citations omitted).

63. *Materials Research Corp.*, 262 N.L.R.B. 1010, 1016 (1982).

the Board reconsidered its position three times as to whether the *Weingarten* right to employee representation in a disciplinary interview extended to non-union employees.

A. *The Materials Research Case: The Board First Extends Weingarten Rights to Non-Union Employees*

For the first time, the Board extended the *Weingarten* right to have a representative present at a disciplinary interview to non-union employees in the *Materials Research* case.⁶⁴ This case involved a change in work schedules that resulted in some employee discontent.⁶⁵ The new schedule called for employees to report to work and depart in intervals staggered by ten minutes.⁶⁶ Several employees including the charging party, Steve Hochman, gathered to meet with their supervisor, Steven Cross, regarding the new schedule. At the meeting, Hochman expressed his dissatisfaction with the new schedule, to which Cross responded that it was not a group problem and that he would handle the problems individually.⁶⁷ Later the same day, Cross objected to Hochman's organization of the meeting, arguing that Hochman had confronted his co-workers without the right to organize a meeting during work hours (even though the meeting in question actually took place during the lunch hour).⁶⁸ Cross approached Hochman in the work area and stated that Hochman "had no right to organize a meeting."⁶⁹ Cross again told Hochman that he wanted to talk.⁷⁰ When Hochman asked for proper representation for any possible investigatory interview or disciplinary hearing, Cross denied his request for a co-worker representative.⁷¹ Nonetheless, Hochman complied with Cross's order to sit down and talk.⁷² Cross verbally warned Hochman about failing to follow the company's grievance procedure by organizing the group meeting. Cross then placed a written copy of the warning in Hochman's personnel file.⁷³

64. *Id.*

65. *Id.* at 1010. The schedule required that employees arrive at ten-minute intervals and depart in a similar manner. *Id.* It was implemented the day following notification. *Id.*

66. *Id.* at 1010-11.

67. *Id.* at 1010.

68. *Id.* at 1010-11.

69. *Id.* at 1011.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* Both the administrative law judge and the Board majority found that the two interviews to which Hochman was subjected met "all prerequisites for the application of the *Weingarten* rights." *Id.* at 1011 n.5.

At trial, the Administrative Law Judge (ALJ) extended some, but not all, *Weingarten* rights to non-union employees. The ALJ found that the right to organize and participate in a group meeting was protected by section 7.⁷⁴ Even though the company had a grievance procedure in place, an internal procedure can only supplement, but does not replace, section 7 rights.⁷⁵ Therefore, the company violated section 8(a)(1) by disciplining Hochman and others for their participation in activities protected under section 7.⁷⁶ Nonetheless, the ALJ did not extend the right to have a co-worker present in an investigatory interview to the non-union environment because he determined it would not serve any of the NLRA's purposes.⁷⁷ A co-worker would not be an experienced representative who could improve the efficiency of the interview process, thereby saving production time.⁷⁸ Nor would the coworker in the non-union environment be in a position to protect any rights for Hochman and others, because no such union rights existed.⁷⁹

On appeal, a majority of the Board extended *Weingarten* rights to cover a non-union employee's request for representation, and affirmed the employee's right to organize and participate in a group meeting.⁸⁰ The majority stated that employers should not limit *Weingarten* rights to the union context because, in light of the language in the *Weingarten* decision, the right to representation derives from section 7 of the Act, rather than from section 9.⁸¹ "It is the employee's request for such assistance that constitutes concerted action for mutual aid or protection, activating the Act's protections and requiring the employer either to respect the employee's choice or to forego the interview completely."⁸² The Supreme Court in *Weingarten* limited the representative's role at an investigatory interview to assisting the employee, clarifying facts, and suggesting other employees who might have relevant information.⁸³ The Court noted that the employer need not bargain with the representative, and could choose to omit the interview from disciplinary

74. *Id.* at 1027.

75. *Id.* at 1024.

76. *Id.* at 1027.

77. *Id.*

78. *Id.* at 1026.

79. *Id.*

80. *Id.* at 1012.

81. *Id.* The majority consisted of Members Fanning, Zimmerman, and Jenkins. Chairman Van de Water and Member Hunter dissented. By the time the Board retracted *Weingarten* rights for non-union employees in the *Sears, Roebuck* case in 1985, only Member Hunter still continued as a Board member. *Slaughter v. NLRB*, 794 F.2d 120, 124 n.4 (3d Cir. 1986).

82. *Materials Research*, 262 N.L.R.B. at 1012.

83. *Id.* (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975)).

proceedings altogether.⁸⁴ Further, even the *Weingarten* dissent specifically assumed that the section 7 right would also apply in a non-union context.⁸⁵ Consequently, the *Materials Research* majority found that the “rationale enunciated in *Weingarten* compels the conclusion that unrepresented employees are entitled to the presence of a coworker at an investigatory interview.”⁸⁶

In fact, the need for support may be even greater in the absence of a collective bargaining agreement or grievance-arbitration procedures that operate as a check on “an employer’s ability to act unjustly or arbitrarily.”⁸⁷ “Since a purpose underlying *Weingarten* is to prevent an employer from overpowering a lone employee, the presence of a coworker, even if that individual does nothing more than act as a witness, still effectuates that purpose, just as the presence of a union representative.”⁸⁸ A sympathetic fellow employee provides moral support at an investigatory interview that might lead to discipline and, as a witness to employer action, may diminish the chance of unjust treatment.⁸⁹

Chairman Van de Water concurred in part and dissented in part in *Materials Research*, because he found that the section 7 right to representation at an investigatory interview only attaches if there is a “duly recognized or certified union.”⁹⁰ Section 9(a) of the Act requires that where an exclusive representative exists, an employer may not deal individually about terms and conditions of employment.⁹¹ Thus, the employee’s right to representation and the employer’s obligation are grounded in the collective bargaining relationship. The employer does not have to accede to the employee request,⁹² no more than he is required to agree to specific contract terms, and may forego the

84. *Id.* (citing *Weingarten*, 420 U.S. at 259–60).

85. *Id.* at 1013 (citing *Glomac Plastics, Inc. & Textile Workers Union of Am.*, 234 N.L.R.B. 1309, 1311 (1978)).

86. *Id.* at 1014.

87. *Id.* (citing *Glomac Plastics*, 234 N.L.R.B. at 1311). The Board also quoted language regarding the Act’s design “to redress the perceived imbalance of economic power between labor and management.” *Id.* (quoting *American Ship Building Co. v. NLRB* 380 U.S. 300, 316 (1965)).

88. *Id.* at 1015.

89. *Id.* at 1014–15.

90. *Id.* at 1016 (Van de Water, Chairman, concurring and dissenting). Chairman Van de Water concurred with the majority’s adoption of “the Administrative Law Judge’s finding that Respondent violated Sec. 8(a)(1) by interrogating its employees about their group meeting to discuss work schedule changes and by disciplining Hochman for organizing and participating in the meeting.” *Id.* at 1016 n.27.

91. *Id.* at 1016–17.

92. *Id.* at 1017–18.

interview altogether. The Chairman took issue with the “exalted position” the majority gave to the right to representation at investigatory interviews and objected to the “hybrid relationship” imposed upon non-union employers based upon section 7, given the absence of concomitant responsibilities and “normal safeguards” placed upon labor organizations.⁹³ He perceived the majority view as amending the Act, rather than applying it.⁹⁴ The majority opinion permits “an otherwise limited Section 7 right ‘to run wild’ beyond congressional intent.”⁹⁵

Member Hunter also concurred and dissented in *Materials Research*.⁹⁶ He too adopted the ALJ’s findings of section 8(a)(1) violations but dissented over the extension of *Weingarten* rights to unrepresented employees.⁹⁷ Member Hunter saw the holding in that case as grounded in the status of a union as a collective bargaining representative.⁹⁸ The union steward has the skills and experience, unlike a representative in a non-union setting. Member Hunter summarized the *Weingarten* Court’s finding that a knowledgeable union representative could assist the employer by eliciting favorable facts.⁹⁹ However, a representative in a non-union setting would have no experience in dealing with such situations, and might be emotionally involved in the interview due to friendship with the employee.¹⁰⁰ Member Hunter did not agree with expanding *Weingarten* rights; he saw it as a “Pandora’s box” that the Supreme Court did not intend.¹⁰¹

For a brief time after the *Materials Research* decision, the Board continued to follow the precedent that *Weingarten* rights protect a non-union employee’s right to refuse to submit to an investigatory interview without a witness.¹⁰² One year after the Board’s decision in *Materials Research*, the Third Circuit Court of Appeals affirmed the extension of

93. *Id.* at 1019.

94. *Id.*

95. *Id.* at 1021. Chairman Van de Water saw this creation of nonstatutory rights as problematic without the Act’s offsetting checks and balances. *Id.*

96. *Id.* at 1021 (Hunter, Member, concurring and dissenting).

97. *Id.* at 1021 n.42.

98. *Id.* at 1021.

99. *Id.*

100. *Id.*

101. *Id.* at 1021–22.

102. See generally *Slaughter v. NLRB*, 876 F.2d 11, 12–13 (3d Cir. 1989) (per curiam) (describing the history of the *Materials Research* precedence on the board, the board’s decision to overturn *Materials Research* in *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985) (discussed *infra*), and the effect of the *Sears* decision on *DuPont*). The Board actually followed the reasoning of *Materials Research* on the same day in *E.I. DuPont de Nemours & Walter J. Slaughter v. NLRB*, 262 N.L.R.B. 1028, 1029 (1982), *overruled by* *Epilepsy Found.*, 331 N.L.R.B. 676 (2000).

Weingarten rights to the non-union setting in *E.I. DuPont de Nemours & Co. v. NLRB*.¹⁰³

B. The DuPont Case: The Board Reconsiders its Materials Research Decision

The Third Circuit, according special deference to the expertise of the Board in *DuPont*, held the Board's construction of the NLRA permissible, and found that the *Weingarten* holding was not expressly grounded in the existence of a union.¹⁰⁴ Nonetheless, the Board moved the Court of Appeals to vacate its decision in *DuPont* and remand the matter to the Board for further consideration.¹⁰⁵ The Board stated that it had another case with similar issues, and was giving thought to the questions involved.¹⁰⁶ The Court of Appeals once again deferred to the Board's expertise, vacated its opinion, and remanded the case.¹⁰⁷

C. DuPont Reconsidered and Sears, Roebuck & Co.: The Board Revokes Weingarten Rights in the Non-Union Setting

On the same day that the Board reconsidered the *DuPont* case, it announced its decision in *Sears, Roebuck & Co.*—the case that sparked the Board's motion to vacate and remand *DuPont*.¹⁰⁸ In *Sears*, a three-member majority, composed of Chairman Dotson and Members Hunter and Dennis, agreed with former Chairman Van de Water's dissent in *Materials Research* and noted that the *Weingarten* right applies exclusively in a union setting based upon section 9 of the Act.¹⁰⁹ The application of *Weingarten* rights where no union is present consequently creates "havoc with fundamental provisions of the Act."¹¹⁰ Such application removes a non-union employer's right to deal with employees on an individual basis regarding investigatory interviews that reasonably could lead to discipline. The majority in *Sears* objected to the rationale that *Weingarten* was based on section 7 of the Act.¹¹¹ Member Hunter concurred with the majority, writing separately that the

103. *E.I. DuPont de Nemours & Co. v. NLRB*, 724 F.2d 1061, 1063–64 (3d Cir. 1983), vacated 733 F.2d 296 (3d Cir. 1984).

104. *Id.* at 1065.

105. *E.I. DuPont de Nemours & Co. v. NLRB*, 733 F.2d 296, 296 (3d Cir. 1984).

106. *Id.* at 297.

107. *Id.* at 298.

108. *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 230 (1985).

109. *Id.* at 230–31. Section 9 vests exclusive representative authority regarding terms and conditions of employment including disciplinary matters in a duly recognized or certified representative. *Id.*

110. *Id.* at 231.

111. *Id.*

extension of *Weingarten* rights to non-union employees would be “permissible but not a reasonable construction of the Act.”¹¹² Hunter would not rely, as the majority in *Materials Research* did, upon Justice Powell’s dissent in *Weingarten*, which assumed the same section 7 right “also exists in the absence of a recognized union.”¹¹³

Along with its decision in *Sears*, the Board issued a supplemental decision and order in the *DuPont* case, ruling that in light of the *Sears* decision and in the absence of a certified or recognized bargaining representative, the employee’s unfair labor practice complaint should be dismissed.¹¹⁴ Thus, the Board had effectively overruled *Materials Research* through *Sears* and *DuPont* and had revoked the *Weingarten* right to representation from the non-union setting.

D. The Court of Appeals Stands by its Earlier Position

The Court of Appeals for the Third Circuit granted the petition to review the supplemental decision.¹¹⁵ Importantly, the Court of Appeals in *DuPont* refused to sustain the Board’s holding in *Sears*, because that holding led to a conclusion that did not permit other interpretations of the Act.¹¹⁶ The Third Circuit instead adhered to its earlier view that the NLRA permits the *Materials Research* holding.¹¹⁷ However, the appellate court did not substitute its judgment for that of the Board and constrained its review of Board interpretations of the NLRA to a determination of reasonableness.¹¹⁸ The court rejected the notion of *Weingarten* rights as rooted in the section 8(a)(1) right to bargain collectively, stating instead “it is plain beyond cavil that the *Weingarten* right is rooted in § 7’s protection of concerted activity.”¹¹⁹

The Third Circuit then reviewed the Board’s analysis of *Emporium Capwell*.¹²⁰ While the Board stated that *Emporium Capwell* stands for the proposition that “§ 7 rights are circumscribed by § 9(a)” and thus,

112. *Id.* at 232 (Hunter, Member, concurring).

113. *Id.* at 233 (Hunter, Member, concurring).

114. E. I. DuPont de Nemours & Walter J. Slaughter, 274 N.L.R.B. 1104 (1985). Similarly, the Board reconsidered and reversed its earlier finding of a section 8 (a)(1) violation regarding DuPont’s insistence upon conducting an investigatory interview with James Merriman after his request for a co-worker present in the same non-union setting. E.I. DuPont de Nemours & Teamsters Local 515, 274 N.L.R.B. 1451, 1451 (1985).

115. *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986).

116. *Id.* at 122.

117. *Id.*

118. *Id.* at 124–25.

119. *Id.* at 126.

120. *Id.* at 127 (citing *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975)).

the extension of *Weingarten* rights to non-union employees would conflict with the section 9(a) exclusivity principle, the Third Circuit rejected this analysis as an overly broad misconstruction of the case.¹²¹ The court noted the intent behind *Emporium Capwell* was to protect a union's exclusive status under section 9(a) as the organization's bargaining representative; not to limit the section 7 rights of non-union employees.¹²² As a result, the court found section 9(a) irrelevant in non-unionized settings.¹²³ Therefore, the Third Circuit remanded the *DuPont* case to the Board for further proceedings consistent with its opinion.¹²⁴

In revisiting the *DuPont* case on remand for the second time from the appellate court, the Board admitted that the Act permitted the *Materials Research* holding.¹²⁵ The Board, however, described its role as, in the words of the Supreme Court, "reconciling conflicting interests of labor and management."¹²⁶ The Board then differentiated non-unionized settings from those with unions and found certain interests recognized by the Supreme Court in *Weingarten* to be present in unionized settings but either absent or less compelling in non-unionized settings.¹²⁷ As a result, the Board deemed that it reached a fair and reasoned balance between the interests of labor and management in a non-unionized setting "by not imposing the constraints on investigatory interviews that recognition of the '*Weingarten* right' entails."¹²⁸

The Board spelled out these interests.¹²⁹ The first interest that affects labor and management in a unionized setting is the possibility that a union representative may protect the interests of not only the employee being investigated, but also the interests of the bargaining unit as a whole.¹³⁰ The Board noted that whereas a union representative has an obligation to exercise "vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly[.]" a non-union fellow employee has no such obligation to protect other employees.¹³¹

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 128.

125. *E. I. DuPont de Nemours & Walter J. Slaughter*, 289 N.L.R.B. 627, 628 (1988).

126. *Id.* (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

127. *Id.* at 629.

128. *Id.* at 628.

129. *Id.* at 628–29.

130. *Id.* at 629.

131. *Id.* (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260–61 (1975)).

The Board outlined a second interest: the employer's.¹³² In *Weingarten*, the Court noted that a skilled and knowledgeable union representative served the interests of the employer by bringing forth favorable facts from a fearful or otherwise nervous employee.¹³³ The influence of a union representative results in time saved for all parties involved and a fair resolution to an otherwise distracting grievance.¹³⁴ However, the Board stated, a fellow non-union employee representative has no skills akin to that of a union representative.¹³⁵ Furthermore, the Board noted the absence of any obligation on the part of a non-unionized employer to continue the investigatory interview once the non-union employee has requested a representative.¹³⁶ The Board also noted the lack of an alternative grievance resolution framework in non-unionized work environments, when compared with that found in unionized settings.¹³⁷ It stated that requiring an employer to allow the non-union employee to bring a representative encourages employers to skip the investigatory interview and automatically take disciplinary action.¹³⁸ This would unfortunately result in the denial of an employee's only chance to tell his side of the story.¹³⁹ Therefore, the Board extended the holding in *Sears* and refused to grant *Weingarten* rights to employees in non-unionized settings.¹⁴⁰ The Court of Appeals for the Third Circuit upheld as permissible the Board's interpretation of the Act.¹⁴¹

E. Epilepsy Foundation: *Weingarten* Rights Once Again Extend to Non-Union Employees

In *Epilepsy Foundation*, the Board once again went against precedent to re-establish the *Weingarten* right in non-union settings.¹⁴² Two

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 630.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 628.

141. *Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989) (per curiam).

142. *Epilepsy Found.*, 331 N.L.R.B. 676 (2000); see also Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 842-58 (2003) (discussing the *Epilepsy* decision and its implications for non-union workplaces); LaDawn L. Ostmann, Comment, *Union Rights, No Dues: In Re Epilepsy Foundation and the NLRB's Extension of Weingarten Rights to NonUnion Employees*, 45 ST. LOUIS U. L.J. 1309, 1331-47 (2001) (discussing the *Epilepsy* decision); Robyn Wilensky, Note, *Can I Get a Witness?: Extension of the Weingarten Right in the Non-Unionized Workplace—Problems of*

employees were disciplined and terminated for engaging in various activities, some of which were protected under section 7, and some of which were not.¹⁴³ The protected activities included discussing wages with other employees and starting a “Brown Bag Lunch” program in which employees gathered at lunchtime to discuss matters of concern.¹⁴⁴ The primary unprotected activity was the employees’ submission of a memo to their project supervisor indicating that they no longer needed his supervision.¹⁴⁵

Each employee initially refused the requests of the Foundation’s Executive Director for a meeting, unless the other could be present.¹⁴⁶ One of the employees was terminated, but the other eventually agreed to the meeting.¹⁴⁷ However, even the employee who agreed to meet was terminated for insubordination.¹⁴⁸ Constrained by the precedent of *DuPont*, the ALJ found that the Foundation did not violate its employees’ rights by disciplining and terminating them.¹⁴⁹

On appeal to the Board, the Board agreed that the discharges of both employees were unlawful.¹⁵⁰ Chairman Truesdale and Members Fox and Leibman reverted to *Materials Research*, basing their decision on the Supreme Court’s grounding of the *Weingarten* right in the section 7 right for employees to “engage in ‘concerted activities for the purposes of mutual aid or protection.’”¹⁵¹ The Board explained that, similar to unionized settings, in non-unionized settings the presence of a co-worker increases the employee’s ability to ensure “that the employer does not initiate or continue a practice of imposing punishment unjustly.”¹⁵² The Board attacked the notion that employee representatives lack both the skills of a union representative and the obligation that union representatives have to all employees in the union. It found this type of argument speculative and believed giving

Implementation Create Potential Harm for Both Employers and Employees, 36 GA. L. REV. 315, 319 (2001) (expressing concern that the *Epilepsy Foundation* decision will have profound impact on non-union workplaces, which are the vast majority of workplaces, and criticizing the lack of guidance provided by the Board for its implementation).

143. *Epilepsy Found.*, 331 N.L.R.B. at 704.

144. *Id.* at 700, 702.

145. *Id.* at 702–03.

146. *Id.* at 703.

147. *Id.*

148. *Id.*

149. *Id.* at 704–05.

150. *Id.* at 676.

151. *Id.* at 678 n.9 (quoting section 7 of the NLRA). Members Hurtgen and Brame dissented in part. *Id.* at 682, 685.

152. *Id.* at 678 (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)).

employees their choice to have representatives constituted the crux of the issue.¹⁵³ As for the *DuPont* argument that extending *Weingarten* rights will actually work to the detriment of employees by encouraging employers to skip the investigatory interview and therefore deprive employees of their only chance to tell their side of the story, the Board noted that this too is speculative and ignores the fact that employees are not obligated to request a representative.¹⁵⁴ The Board overruled *DuPont* and, after finding that no manifest injustice would occur, retroactively applied the *Weingarten* right to the case at hand.¹⁵⁵

On appeal, the District of Columbia Circuit Court affirmed the Board in part and reversed in part with respect to the Board's retroactive application of the holding.¹⁵⁶ The court reasoned that the mere presence of a co-worker gives the employee a witness and an advocate and may therefore dissuade the employer from unjustly punishing the employee.¹⁵⁷ Thus, the court noted that the Board's determination that an employee's request for a co-worker's presence at an investigatory interview fell under section 7's "concerted activity" was reasonable, so the court upheld it.¹⁵⁸

The court proceeded to reverse the Board's holding with respect to retroactive application, noting that people must be able to rely on existing law; therefore, retroactive effect can only be given to new applications or clarifications of existing law.¹⁵⁹ In this case, the Board had a clear policy of refusing *Weingarten* rights to non-unionized employees. Thus, the court should have allowed the Epilepsy Foundation to rely on that existing rule.¹⁶⁰ The Foundation did not violate the existing rule, so the court denied the retroactive application for reasons of equity and fairness.¹⁶¹

IV. *IBM CORP.*: NLRB RE-ESTABLISHES PRECEDENT RETRACTING *WEINGARTEN* PROTECTION FOR NON-UNION EMPLOYEES

In *IBM Corp.*,¹⁶² the Board once again decided to limit the *Weingarten* right to employees represented by a section 9(a) bargaining

153. *Id.* at 679.

154. *Id.*

155. *Id.* at 679–80.

156. *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001).

157. *Id.* at 1100.

158. *Id.*

159. *Id.* at 1102.

160. *Id.*

161. *Id.* at 1102–03.

162. *IBM Corp.*, 341 N.L.R.B. No. 148, 174 L.R.R.M. (BNA) 1537 (June 9, 2004).

representative.¹⁶³ Chairman Battista authored the plurality opinion, which Member Meisburg joined. *IBM* involved an investigation of alleged harassment lodged by a former employee in a non-union setting.¹⁶⁴ The employer, IBM, interviewed three employees without request or benefit of a co-worker present.¹⁶⁵ However, at a subsequently scheduled interview, one of the charging parties made a request for a co-worker or an attorney, but the employer denied the request.¹⁶⁶ Thereafter, all three parties made such requests, which their employer denied. IBM interviewed the three employees and discharged them.¹⁶⁷ The ALJ found that the denial of the employees' requests to have a co-worker present violated section 8(a)(1) of the Act, in accordance with *Epilepsy Foundation*.¹⁶⁸

The Board plurality in *IBM* reverted to its holding in the *DuPont* decision, finding it a permissible construction of the Act to deny *Weingarten* rights in a non-union setting.¹⁶⁹ The Board found that limiting the extension of *Weingarten* rights beyond situations where there is a section 9(a) exclusive bargaining representative was supported by policy considerations.¹⁷⁰ Looking back to the decision of the Court of Appeals for the Third Circuit in *DuPont*, the Board in *IBM* noted that the circuit court's construction of *Weingarten* rights flowed from section 7, and that it "is at least permissible to interpret Section 7 as guaranteeing union members and unorganized employees alike the right to a representative at investigatory interviews."¹⁷¹ The *IBM* Board agreed with the decision of the Board on remand in *DuPont*, refusing to extend the *Weingarten* right to the non-union workforce because of significant policy considerations.¹⁷² The Board must decide among

163. *Id.* at 1538–39.

164. *Id.* at 1538.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1542–43.

170. *Id.* at 1541–43. The plurality argued that, unlike union representatives, ordinary co-workers do not represent the interests of the entire work force and lack both the power to negotiate with employers as equals and the skills that are needed in investigatory settings. *Id.* at 1541–42. Moreover, union representatives owed a legal duty of fair representation that would prevent them from disclosing confidential material, while no such constraint applied to co-workers in general. *Id.* at 1542–43.

171. *Id.* at 1539 (internal quotation marks omitted) (quoting *Slaughter v. NLRB*, 794 F.2d 120, 127 (3d Cir. 1986)).

172. See *supra* note 114 and *infra* text accompanying notes 174–187 (describing the policy basis for the *DuPont* and *IBM* approach).

permissible interpretations of the Act, and may choose to reexamine past constructions in light of its “cumulative experience.”¹⁷³

Chairman Battista and Member Meisberg noted the many changes in the workplace environment in recent years, “including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence.”¹⁷⁴ The plurality opinion in *IBM* supported its decision with a discussion of the years following *Weingarten* in which there was a “rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks in our country.”¹⁷⁵ The opinion also cited an increase in corporate abuse, fiduciary lapses, and the aftermath of September 11, 2001, for support in returning to the result and rationale set forth in *DuPont*.¹⁷⁶ In approving the rationale of the Board in *DuPont*, the *IBM* decision again emphasized that non-union co-workers, as opposed to union representatives, do not represent the entire workforce and do not have the skills necessary to represent the employee. Due to the lack of a grievance or arbitration process, a non-union employee could lose his only chance to tell his version of an incident if an employer exercised its right to dispense with the interview and proceed to discipline.¹⁷⁷

Co-workers in a non-union environment do not have the legal authority, obligation, or incentive to represent the interests of the entire work force.¹⁷⁸ Co-workers cannot redress the imbalance of power between employer and employee, because a co-worker does not have the force of a bargaining unit behind him, nor does he have knowledge of the “law of the shop”¹⁷⁹ or the status of a union representative.¹⁸⁰ The

173. *IBM*, 174 L.R.R.M. (BNA) at 1539–40 (internal quotation marks omitted) (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265–66 (1975)).

174. *Id.* at 1540.

175. *Id.* at 1541.

176. *Id.* The Board felt that employers could best conduct investigations in a “thorough, sensitive, and confidential manner . . . in a nonunion setting . . . without the presence of a coworker.” *Id.* at 1540.

177. *Id.* at 1541. Alternatively, in some instances, the employee could back down from the request for a co-worker witness, and, with the employer’s acquiescence, the disciplinary interview could proceed. *Id.* Also, the collective bargaining contract sets up the grievance and arbitration process in a union setting. *Id.*

178. *Id.*

179. “Law of the shop” means a body of consistent practices dealing with workplace issues. *Id.* at 1542. It is the knowledge of the workplace and its politics. *Id.* “A union representative is accustomed to administering collective-bargaining agreements and is familiar with the ‘law of the shop,’ both of which provide the framework for any disciplinary action an employer might take against a union member.” *Id.*

Board plurality noted that a co-worker's emotional connection to the employee "could actually frustrate or impede" the investigation, and that where the employee is a "coconspirator" to the incident in question, a co-worker could hardly be as objective as a union representative.¹⁸¹ As the Board also noted in *IBM*, the employer in a non-union environment can deal with employees individually.¹⁸²

Other disadvantages of having co-workers, as opposed to union representatives, at investigatory interviews include the interference with confidentiality and the compromise of the employer's ability to arrive at the truth.¹⁸³ Unlike union representatives, who owe a fiduciary duty to all unit employees, co-workers owe no such duty and thus might violate confidentiality in casual conversation.¹⁸⁴ This danger reduces the likelihood that employees will disclose sensitive or embarrassing information and thus interferes with the investigation. Employers may not discipline employees for requesting the presence of a co-worker in a non-union environment, but the employer need not "accede to the request."¹⁸⁵ The plurality opinion stressed the need for a "bright line" to avoid uncertainty on the shop floor and extensive litigation.¹⁸⁶ Without a section 9 representative, employers maintain the right of private inquiry.¹⁸⁷

Member Schaumber concurred with the plurality opinion in *IBM* to overrule *Epilepsy*.¹⁸⁸ He wrote that the "*Weingarten* right is unique to employees represented by a Section 9(a) bargaining representative."¹⁸⁹ Member Schaumber chided the Board for its *Epilepsy* decision, finding that the wrongful extension of *Weingarten* to non-union settings "infringed upon recognized and fundamental common law management prerogatives" and presumed concerted activity, rather than requiring proof of its presence.¹⁹⁰ Member Schaumber defended his position in

180. *Id.* at 1541–42.

181. *Id.* at 1542. It should be noted that similar concerns could arise if the union representative were a co-conspirator to the incident in question or emotionally connected to the employee and that this distinction hardly justifies removing the *Weingarten* right from non-union groups while allowing unionized employees to retain it.

182. *Id.*

183. *Id.* at 1542–43.

184. *Id.*

185. *Id.* at 1544.

186. *Id.*

187. *See id.* (arguing that an employer's right of private inquiry is properly denied only when employees have a section 9 representative and hence that in the non-union sector, where employees have no such representative, "there is rationally a different result").

188. *Id.* at 1545 (Schaumber, Member, concurring).

189. *Id.*

190. *Id.*

IBM on the basis that the “language and logic of the *Epilepsy* decision do not provide a sufficient analytical framework from which to conclude that the extension of the *Weingarten* right to the nonunion setting is permissible under the Act.”¹⁹¹ According to Schaumber’s concurring opinion, the dissenters’ extension of the right depended upon their interpretation of section 7 as presuming concerted activity, rather than applying a case-by-case analysis to the facts.¹⁹²

Members Liebman and Walsh dissented, writing that the Board’s decision “stripped” the “overwhelming majority” of non-union American workers of a “right integral to workplace democracy.”¹⁹³ The dissenters felt that removing the *Weingarten* right made non-union employees “second-class citizens.”¹⁹⁴ The changes in the workplace cited by the plurality opinion did not justify the withdrawal of the limited right to co-worker representation at an investigatory interview in a non-union setting.¹⁹⁵

Agreeing with *Materials Research*, the dissenters saw the request for assistance as a basic form of concerted activity for mutual aid or protection.¹⁹⁶ They would not limit the right and thus the protection of section 7, to the request of a co-worker’s presence.¹⁹⁷ The dissent found that “[s]eeking a witness, and serving as a witness, in a disciplinary interview” meets the standard for concerted activity.¹⁹⁸ Whether the request is granted is beside the point, in terms of establishing the nature of the activity.¹⁹⁹ The dissent further noted that union representatives have no more statutory obligation to serve the employer’s interests, regarding the imposition of discipline or the preservation of confidentiality, than co-workers.²⁰⁰

In order to justify departing from recent precedent, such as *Epilepsy Foundation*, the Board should provide persuasive reasons.²⁰¹ The

191. *Id.* at 1552.

192. *Id.* at 1553–54.

193. *Id.* at 1554 (Liebman, Member, dissenting).

194. *Id.* at 1555.

195. *Id.*

196. *Id.* at 1556.

197. *Id.* Since non-union workers can be forced to attend an interview without a co-worker witness, this decreases the value of the right. In contrast, union workers can refuse to attend without a representative.

198. *Id.* at 1557.

199. *Id.*

200. *Id.* at 1559. The dissenters noted that “the skill of union representatives and the power of union solidarity . . . [would be] *more* likely to complicate an employer’s investigation than permitting coworker representatives.” *Id.*

201. *Id.* at 1558.

Weingarten right is “modest,” yet the presence of a witness may prevent the imposition of unjust discipline and provide “a measure of due process to workplace discipline, particularly in nonunion workplaces” where many employees are at-will.²⁰² The evolution of the norms of fairness and due process in the workplace are evidenced by statutory developments in the United Kingdom, as well as by the increasing prevalence of alternate dispute resolution mechanisms and grievance procedures, even in non-union workplaces.²⁰³ The dissent believed the *Weingarten* right in a non-union setting furthered the purposes of the Act, as well as the norms where employers “respect something like the rule of law.”²⁰⁴ Further, the concerted activity experienced in the context of the investigatory interview might lead to other concerted activity and even to union representation where supported by a majority of employees.²⁰⁵

V. BOARD DECISIONS FOLLOWING *IBM: HOLLING PRESS* AND *WAL-MART STORES*

A. *Holling Press, Inc.*

After the NLRB’s June decision in *IBM*, the Board faced several other cases involving similar issues in that same year. In November 2004, the Board decided *Holling Press, Inc.*,²⁰⁶ where it determined whether section 7 protected an employee who solicited a co-worker to act as a witness in support of her sexual harassment claim before the New York State Division of Human Rights. In the three-member panel decision, composed of Chairman Battista and Members Liebman and Schaumber, a Board majority affirmed the ruling of an ALJ that complainant Catherine Fabozzi’s solicitation of her co-worker, Susan Garcia’s, testimony for her case was “concerted” activity but “not undertaken for purposes of ‘mutual’ aid or protection.”²⁰⁷ Garcia

202. *Id.* at 1559. As the dissent noted, employers may cancel the interview rather than proceeding in the presence of a union representative. *Id.* at 1555 n.4 (Liebman, Member, dissenting) (citing *Roadway Express, Inc.*, 246 N.L.R.B. 1127, 1129 (1979)).

203. *Id.* at 1560 & nn.29–30.

204. *Id.* at 1560 (“The arbitrary exercise of power by employers, over their employees, no longer strikes us as either natural or desirable.”).

205. *Id.* at 1560 n.31. The dissent noted that this process was what the Act was intended to foster. *Id.* (Liebman, Member, dissenting).

206. *Holling Press, Inc.*, 343 N.L.R.B. No. 45, 175 L.R.R.M. (BNA) 1449, 2004 WL 2368662 (Oct. 15, 2004). Member Schaumber joined Chairman Battista in *Holling Press* for a two-member majority. *Id.* at 1449. Member Liebman dissented. *Id.* at 1452 (Liebman, Member, dissenting).

207. *Id.* at 1449–50. Chairman Battista authored the plurality opinion in *IBM*. *IBM*, 174

informed Fabozzi that the same supervisor who purportedly harassed Fabozzi told Garcia “he was wearing ‘his tight white pants’ for Garcia.”²⁰⁸ When Fabozzi asked Garcia to testify, she told Garcia that she (Garcia) “could be ‘hit’ with a subpoena in any event.”²⁰⁹ Fabozzi complained to her union steward about the leadman harassing her, but the steward deemed the accusation unfounded.²¹⁰ The ALJ dismissed her complaint, and the General Counsel excepted to the dismissal.²¹¹

In *Holling Press*, the Board noted that for an employee’s conduct “to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of ‘mutual aid or protection.’”²¹² Fabozzi engaged in concerted activity, because she sought the help of others, but she “charted a course of action with only one person in mind—Fabozzi herself.”²¹³ Her complaint was individual and her goal was not collective, thus it did not have the purpose of mutual aid or protection.²¹⁴ The Board noted that Fabozzi’s co-worker, Garcia, did not take offense at the supervisor’s comment, nor did she offer Fabozzi assistance.²¹⁵ Mutual aid or protection requires “a common interest in the subject matter.”²¹⁶ The majority distinguished the facts in *IBM*, where an employee’s request for co-worker assistance in a disciplinary context constituted more of a “common everyday occurrence,” unlike the “private” claim seeking a remedy for sexual harassment before a state agency.²¹⁷ The Board distinguished between private lawsuits or charges filed outside the workplace from in-house investigations, the latter being more likely to fit the mutual aid or protection category.²¹⁸

L.R.R.M. (BNA) at 1538. Member Liebman dissented. *Id.* at 1554 (Liebman, Member, dissenting). Member Schaumber concurred with the opinion of Battista and Member Meisburg, thus creating the three-member majority in *IBM*. *Id.* at 1545 (Schaumber, Member, concurring).

208. *Holling Press*, 175 L.R.R.M. (BNA) at 1449.

209. *Id.*

210. *Id.*

211. *Id.* at 1450.

212. *Id.* The Board found that these are related but separate elements needed to establish a violation of section 8(a)(1) of the Act. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1450–51.

216. *Id.* at 1451.

217. *Id.* at 1452 (distinguishing complaints regarding discipline and the threat thereof, the frequency of which creates a mutual interest among employees in ensuring just results from sexual claims, which are sufficiently rare and idiosyncratic as to affect only the immediate parties).

218. *Id.*

The Board's decision also discussed an initial meeting that took place to resolve Fabozzi's complaint internally.²¹⁹ The production manager and union officials met with Fabozzi, and management resolved that to the extent possible, Fabozzi would not have to work alone with the leadman in question.²²⁰ In *Holling Press*, the existence of a union probably resulted in management taking preliminary action to protect the employee, even in the absence of substantiation for Fabozzi's accusations.²²¹

Member Liebman dissented, objecting to the majority's arbitrary standard that resulted in categorizing or assuming that claims of sexual harassment are individual concerns.²²² Resorting to a state agency for investigation of workplace sexual harassment involves a subject matter that "falls within the sphere of mutual aid or protection."²²³ Fabozzi's solicitation of help from Garcia amounted to mutual aid, according to Member Liebman.²²⁴

Member Liebman's dissent noted that four members of the Board endorsed this principle of solidarity in *IBM* in the context of a protected request for a co-worker's presence at a disciplinary meeting, and that the Supreme Court in *Weingarten* similarly recognized that "even though the employee alone may have an immediate stake in the outcome," a plea for help from other employees "implicates 'mutual aid or protection....'"²²⁵ Liebman objected to the distinction framed by the majority in *Holling Press*, where they set out workplace discipline as a commonplace possibility in contrast to the "uncommon" and "'theoretical possibility' that another employee may seek a co-worker's help to stop sexual harassment in the future."²²⁶ Both types of grievances involve terms and conditions of employment.²²⁷ The documented frequency of sexual harassment²²⁸ makes it commonplace,

219. *Id.* at 1449.

220. *Id.*

221. *See id.* The Board also noted that "[m]uch of the meeting centered on whether Fabozzi had threatened [the leadman]." *Id.*

222. *Id.* at 1452 (Liebman, Member, dissenting).

223. *Id.* at 1453.

224. *Id.*

225. *Id.* (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (first internal quotation marks omitted)).

226. *Id.*

227. *See id.* at 1454 ("All that matters is that the grievance involve terms and conditions of employment.").

228. Member Liebman reports that "[i]n fiscal year 2003, . . . the Equal Employment Opportunity Commission (EEOC) received more than 81,000 charges of discrimination, including more than 13,000 sexual harassment charges." *Id.* at 1454 n.6 (citing EEOC enforcement data available at <http://www.eeoc.gov/stats/all.html> and

and all employees benefit from the elimination of sexual harassment and other discrimination in the workplace, so Liebman saw no sound basis for the majority's distinction.²²⁹

While *Holling Press* is not, strictly speaking, a *Weingarten* rights case, it involved the request for a co-worker witness, albeit one to testify before a state agency, and therefore the principles announced in *IBM* are clearly analogous.²³⁰ When should such a request be protected under the Act? The Board found that the complainant's request was concerted, but the majority found that it was not for "mutual aid or protection."²³¹ In this context, it is interesting to compare the different reactions of the two employees regarding their supervisor's or leadman's comments and conduct. Fabozzi was offended and claimed that she was subjected to unlawful sexual harassment. While Garcia was not offended by the leadman, she was seemingly offended by Fabozzi's strong statement to her that she (Garcia) "could be 'hit' with a subpoena in any event."²³² The judge dismissed Fabozzi's complaint, finding that her "conduct was not protected because she threatened her co-workers."²³³ The Board found Fabozzi's conduct protected, but personal, and thus not for mutual aid or protection within the meaning of the Act.²³⁴

Should the existence of mutual aid or protection turn upon the reactions of one co-worker? Is it probable that another co-worker might have agreed with Fabozzi's "take" on the supervisor's conduct and/or allowed Fabozzi's "threat" to wash over her? Because the existence of subpoena power is a fact of life within the legal system, it seems that an employee's threat of subpoena should hardly remove her conduct from its protected status. The Board's determination that Fabozzi's termination was lawful because she was not engaged in protected activity leaves much to be desired in light of the important statutory rights that she sought to assert—rights that should be protected from employer retaliation.²³⁵ While such rights do not give an employee carte blanche to threaten other employees, in Fabozzi's case, the mention of a

<http://www.eeoc.gov/stats/harass.html>).

229. *Id.* at 1453–54.

230. The majority in *Holling Press* distinguished *IBM* on the basis that discipline and the threat of such are commonplace occurrences, unlike the private matter involved in a sexual harassment claim as in *Holling Press*. *Id.* at 1452.

231. *Id.* at 1451.

232. *Id.* The Board characterized Fabozzi's conduct in this regard as "aggressive." *Id.*

233. *Id.* at 1450.

234. *Id.* at 1449.

235. The right to be free from sexual harassment in the workplace is based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-4 (2000).

subpoena led the judge to conclude that Fabozzi was acting for herself and not for others.²³⁶ Whether Fabozzi's accusations were credible would be ascertained through the use of her and co-worker's testimony via the administrative agency process. Garcia had just told Fabozzi about a comment that the leadman in question had made to her that could be construed as evidence of sexual harassment.²³⁷ Garcia's sensibilities may not have been offended, but the statements appeared relevant to the preparation of a complaint by the State agency.

B. Wal-Mart Stores

In December 2004, Board Members Liebman and Walsh formed the majority of a three-member panel in *Wal-Mart Stores*, a case involving an employee's refusal to participate in an investigatory interview that reasonably could have, and in fact did, lead to discipline.²³⁸ Wal-Mart, a non-union employer, insisted that employee Ken Stanhope continue participating in the investigatory interview even after his request for a co-worker witness was denied.²³⁹ Wal-Mart convinced the terminated employee, Stanhope, to attend an investigatory interview without a requested co-worker witness, at which he was largely uncooperative.²⁴⁰ Wal-Mart sent him home and told him to prepare a written statement while it investigated the incident in question.²⁴¹ The following day, Stanhope refused to attend another interview without a witness or to prepare a written statement.²⁴² Wal-Mart then terminated him on the bases of his foul language and creation of a hostile work environment.²⁴³ His manager testified that Stanhope's refusal to cooperate and particularly his refusal to prepare a written statement led to his termination on the date in question.²⁴⁴

In accordance with the *IBM* decision, the NLRB found that a non-union employee remains entitled to request the presence of a co-worker at an interview that he reasonably believes could lead to discipline.²⁴⁵ Because the non-union employee is not, however, entitled to insist upon

236. *Holling Press*, 175 L.R.R.M. (BNA) at 1449–50.

237. *Id.* at 1449.

238. *Wal-Mart Stores, Inc.*, 343 N.L.R.B. No. 127, 176 L.R.R.M. (BNA) 1145 (Dec. 16, 2004). Chairman Battista dissented in part. 176 L.R.R.M. (BNA) at 1146 (Battista, Chairman, dissenting in part).

239. *Id.* at 1145.

240. *Id.* at 1146–47.

241. *Id.* at 1147.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 1146.

the presence of a co-worker, the employer need not accede to the request and may continue with the interview without the presence of a co-worker witness.²⁴⁶ Section 7 protects the request as concerted activity such that an employer violates section 8(a)(1) if he disciplines the employee because of the request.²⁴⁷ After the *IBM* decision, the lawfulness of the discharge hinges “on whether [the employee] was discharged for his March 16 request [which is legally protected] or his March 17 refusal [which is not protected].”²⁴⁸ Thus, the Board’s decision in *Wal-Mart* states that after *IBM*, non-union employers may insist upon continuation of the interview without a co-worker witness.²⁴⁹

It is interesting that Members Liebman and Walsh, both of whom were dissenters in *IBM*, rather graciously joined with Chairman Battista in the part of the *Wal-Mart Stores* decision that upheld the retraction of *Weingarten* rights in a non-union setting.²⁵⁰ Nonetheless, Liebman and Walsh insisted upon remanding to the ALJ to determine whether *Wal-Mart* violated section 8(a)(1) by discharging the complainant.²⁵¹ The majority of the Board sought clarification of the basis for the judge’s decision because of the reversal of the relied on *Epilepsy* precedent and the judge’s reference to both the request for a witness and the refusal to attend the investigatory interview as protected activity.²⁵² The Board majority remanded the case to determine whether the employer terminated the employee for requesting a witness at the interview, rather than for refusing to participate in the investigatory interview without a witness.²⁵³

Chairman Battista dissented in part, specifically from the majority’s order to remand to determine whether the complainant’s request for a witness was a motivating factor in the discharge decision, and if so, whether the complainant would have been terminated absent that protected conduct.²⁵⁴ Chairman Battista dissented from the majority opinion in *Wal-Mart* because he saw enough valid reasons for the employer’s termination of Stanhope that the single protected reason,

246. *Id.*

247. *Id.* (citing *IBM Corp.*, 341 N.L.R.B. No. 148, 174 L.R.R.M. (BNA) 1537 (June 9, 2004)).

248. *Id.*

249. *Id.* (“It is clear that, under *IBM*, the Respondent . . . could lawfully require Stanhope to continue that investigatory interview without the presence of his requested witness.”).

250. *Id.* at 1145–46.

251. *Id.* at 1146.

252. *Id.*

253. *Id.*

254. *Id.* at 1146–47.

requesting a witness at the investigatory interview, was immaterial.²⁵⁵ In Battista's view, the employee would have been terminated anyway for the other reasons.²⁵⁶

The Board's *Wal-Mart* decision includes the ALJ's decision with extensive findings of fact.²⁵⁷ The facts there supported a remand to reassess the circumstances that motivated Stanhope's discharge and to determine whether he would have been terminated absent the protected conduct in light of the changing coverage of protected conduct announced by the Board in *IBM*.²⁵⁸ The majority correctly required the ALJ upon remand to disentangle his numerous findings of fact and apply the appropriate standard for assessing the employer's motivation.²⁵⁹

The facts in *Wal-Mart* also provide a good example of why *Weingarten* rights fall within the ambit of section 7 protection. While some of Stanhope's conduct was clearly out of order, such as his use of offensive language toward a co-worker and his physical crowding of her,²⁶⁰ he was partly trying to convince the female employee to support a union.²⁶¹ The protected conduct must be separated from the unprotected

255. *Id.* at 1147 (pointing to Stanhope's refusal to attend the meeting without a witness, his refusal to supply a written statement, and his use of profanity toward a co-worker as three additional reasons for *Wal-Mart* to discharge him).

256. *Id.* ("There were at least 3 reasons for discharging Stanhope, all of which were unprotected activity Even assuming arguendo that a fourth reason for the discharge was Stanhope's request for a witness, I think it clear that Stanhope would have been fired for the three reasons (at least collectively).").

257. *Wal-Mart Stores, Inc.*, 343 N.L.R.B. No. 127, slip op. at 3–8 (Dec. 16, 2004).

258. *Id.*

259. *Wright Line* established the following standard for measuring employer motivation in mixed-motive cases:

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, *NLRB v. Wright Line*, 662 F.2d 899, 909 (1st Cir. 1981).

260. The latter was documented in the decision of the A.L.J. in *Wal-Mart*, 343 NLRB No. 127, slip op. at 5.

261. See *Wal-Mart*, 343 N.L.R.B. No. 127, slip op. at 4–5 (reciting Stanhope's alleged comments that "if the union were in charge [Wal-Mart employees] wouldn't be having these problems," hence the employees "need to have a union"). The employee who complained about Stanhope's harassment testified that she discussed the crowding incident with another co-worker in the break room. *Id.* at 5. The other employee was quoted as saying that she was not surprised at Stanhope's behavior because "she knew that he was pro union." *Id.* The complaining employee also noted in her statement that she was scared that the discharged employee, Stanhope, might talk to her about "it" again. *Id.* at 6. "It" was inferred as being the need for a union. Both use of profanity and harassment were a basis for discipline, including termination, in the *Wal-*

misconduct, but the danger of terminating an employee because of an incident that arose, at least in part because of protected conduct, illustrates the care that should be exercised in the setting of an investigatory interview. It was also clear in *Wal-Mart* how the announced rule of labor law set the minimum (and, concomitantly, the maximum) of what employers must and will do in the context of investigatory interviews, because management sets its directives based upon that perceived minimum.²⁶²

VI. ANALYSIS

In light of the history of Board fluctuation on *Weingarten* rights, as most recently evidenced in *IBM* and subsequent decisions, one might wonder where the National Labor Relations Board is headed on the issue of *Weingarten* rights, as well as where it should be headed. The Board has been justifiably criticized for continually changing its position on *Weingarten* rights.²⁶³ The American workplace benefits from clear and consistent labor laws and rules that all parties may rely upon, absent important rational reasons for change.²⁶⁴

The Board's most recent restriction of *Weingarten* rights to unionized employees was not supported by persuasive rational reasons; rather, the decision appears to have reflected the political parties to which the members owed their allegiance.²⁶⁵ Even Member Liebman criticized the

Mart associate handbook of work rules, and this provided the basis for the employer's decision to terminate. *Id.* at 9.

262. See *id.* at 6 n.19. The *Wal-Mart* case discussed how management's conduct relied upon a memo that Wal-Mart had distributed to its managers. *Id.* at 7. The memo outlined Wal-Mart's policies and practices in light of *Weingarten* and *Epilepsy*, noting that employees had a right to request witnesses during investigatory interviews but that managers had a right to refuse. *Id.* Managers were instructed not to allow co-workers at interviews because it would breach the confidentiality of issues brought to managers through the company's "open door policy," whereby associates could bring issues that were bothering them to managers and be ensured that they would be kept confidential. *Id.* The information that gave rise to the investigatory interview in *Wal-Mart* came to management's attention through its "open door policy." *Id.* at 4-5 & n.8.

263. See Paul H. Derrick, *Déjà vu All Over Again: NLRB Decides Nonunion Employees Have No Right to Representation During Investigatory Interview*, 16 S.C. LAW. 22, 24 (Sept. 2004) (noting the "Board has been anything but decisive about whether *Weingarten* rights apply to employees who are not represented by a union").

264. As the dissent in *IBM* noted:

The decision to overrule a recent precedent, carefully reasoned and upheld in the courts, should be based on far more compelling reasons than our colleagues have articulated. Before examining the reasons actually offered, it is worth emphasizing what (besides justifying a departure from the doctrine of stare decisis) those reasons must accomplish.

IBM Corp., 341 N.L.R.B. No. 148, 174 L.R.R.M. (BNA) 1537, 1558 (June 9, 2004) (Liebman and Walsh, Members, dissenting).

265. Republican appointees tend to support employer rights and restriction of union activity

Board for its “deeply divided decisions” and tendency to overturn precedent merely because of the changing composition of the Board, in “knee-jerk or reflexive” actions that result in Board precedent with the “jurisprudential force of a post-it note.”²⁶⁶ The five-member Board is generally composed of at most three members of one political party at a given time.²⁶⁷ At the time of the *IBM* decision, there were three Republican Board members, and they comprised the majority that voted to overturn *Epilepsy Foundation*, thus restricting *Weingarten* rights to unionized employees.²⁶⁸ The political persuasion of the Board’s members should not result in such a tumultuous decision making process.²⁶⁹

Will the courts overrule *IBM*? The federal courts of appeal tend to defer to the Board as the experts on industrial life, and as Member Liebman noted in an interview this past January, the employee involved in the *IBM* case withdrew, so an appeals court will not review that particular decision.²⁷⁰ Thus, in the near future, if at all, another case, likely presented to a Board comprised of different members, would be required in order to cause the Board to revise its present view on *Weingarten* rights.

Ideally, what should the Board do with *Weingarten* rights in the future? There is merit in allowing non-union employees to have rights similar to their organized brethren in the context of an investigatory

whereas Democratic appointees tend to support employee and union rights.

266. McGolrick, *supra* note 13, at S-13. Member Liebman made particular note of the Board’s haste to overturn Clinton-era decisions without waiting to see how they would have “played out” or developed a track record. *Id.*

267. See 29 U.S.C. § 153(a) (2000) (providing the statutory source for the five-member board, and members serve staggered five-year terms; different majority may be appointed within three years of the appointment of a new President); Leonard Bierman, *Judge Posner and the NLRB: Implications for Labor Law Reform*, 69 MINN. L. REV. 881, 902 & n.118 (1985) (noting non-statutory practice maintains political balance by having no more than three members from the same political party); Tracey Cullen, *NLRB Flip-Flops Again on Nonunion Employees’ Weingarten rights*, N.Y. EMP. L. LETTER, Vol. 11, Issue 11, Nov. 2004 (discussing process of NLRB appointments by president, staggered terms, how changes in administration lead to changes in political configuration of Board membership such that generally there are three members of the Board from the same political party as the sitting president).

268. Republicans Chairman Battista, and Members Meisburg and Schamber voted to retract *Weingarten* rights from non-union employees in *IBM*. McGolrick, *supra* note 13, at S-11.

269. See L.M. Sixel, *Political Winds Steer Labor Board’s Decisions*, HOUS. CHRON., June 24, 2004, at 1 (criticizing the NLRB’s frequent reversals on *Weingarten* rights; attributing what seem to be politically motivated reversals to the presidential appointment of Board members for limited terms, and noting problem with instability is that employers never know if they are conforming with law).

270. McGolrick, *supra* note 13, at S-12; see also *Schult v. IBM Corp.*, 123 F. App’x 540, 543 (4th Cir. 2004) (per curiam) (affirming district court dismissal of civil claims including wrongful discharge by same litigants).

interview, because without a union's support, employees are particularly vulnerable and disadvantaged when they are interrogated without the presence of an impartial witness. As Member Liebman lamented, after the Supreme Court's decision in *Weingarten*, the Board initially applied the right to non-union settings but then "'pulled back' that right during the Reagan administration. It is deeply disturbing to me that the majority reversed *Epilepsy* without a shred of empirical evidence that the decision had caused any problems for nonunion employers...."²⁷¹ Liebman, whose term does not expire until August 2006, also stated that the Board's *Holling Press* decision could be considered the "bad sleeper decision of the year," depending upon whether the holding will be confined to its facts.²⁷² The implications of a broad interpretation of *Holling Press* include further erosion of section 7 and other important statutorily protected rights. The Board majority, in striving for their desired outcome in *Holling Press*, seems to have unduly restricted the standard for mutual aid or protection with its ruling that seeking co-worker testimony for a sexual harassment complaint before a state agency did not meet the standard because the employee sought to further only her own interest.²⁷³ A workplace free from sexual harassment is in the interest of all employees, even those who have not yet recognized the problem or the value of its elimination.²⁷⁴

The arguments cited by the *IBM* majority in support of withdrawing the right in the non-union context were not convincing, as the dissent noted. Sexual harassment investigations are not new and have certainly been around long before the Board's *Epilepsy* decision in 2000.²⁷⁵ Confidentiality is not entirely assured by having a union representative present at an investigatory interview either; in fact, a union

271. McGolrick, *supra* note 13, at S-12.

272. *Id.*

273. *Holling Press, Inc.*, 175 L.R.R.M. (BNA) 1449, 1450-51 (2004) (determining that the employee, Fabozzi, did not meet the standard for "mutual aid or protection" because she had "charted a course of action with only one person in mind - Fabozzi herself"); *see also supra* note 217 and accompanying text (explaining why sexual harassment claims will rarely meet the "mutual aid or protection" test).

274. *See Holling Press, Inc.*, 175 L.R.R.M. (BNA) 1449, 1454 (2004) (Liebman, Member, dissenting) (noting elimination of unlawful discrimination in workplace, in particular, sexual harassment, as in the interest of all employees in workplace).

275. In *IBM*, the Board noted as one policy consideration supporting denial of the *Weingarten* right to non-union employees that: "[e]mployers face ever-increasing requirements to conduct workplace investigations pursuant to federal, state, and local laws, particularly laws addressing workplace discrimination and sexual harassment." *IBM Corp.*, 174 L.R.R.M. (BNA) 1537, 1541 (2004) (Battista, Chairman, and Meisburg, Member, plurality opinion). The first sexual harassment cases appeared in the mid-1970s, and the EEOC issued guidelines specifically dealing with sexual harassment in 1980. TWOMEY, *supra* note 3, at 424.

representative may take it upon himself to investigate separately, thereby furthering the dissemination of information and rumors regarding the incidents in question. A union representative is just as likely to be involved in the incident under investigation or emotionally involved with a co-worker as any other non-union co-worker witness, and in some instances, a union representative may have union interests or previous employee incidents that influence his conduct.

The Board cited security as a reason for excluding co-worker witnesses in *IBM*.²⁷⁶ Interestingly, the Board also mentioned security in the *Weingarten* case but from a different perspective. *Weingarten* saw the onset of outside security investigators as potentially daunting for employees in an investigatory interview;²⁷⁷ this was used as part of the rationale for upholding the right to have a witness to support the employee. Finally, the *IBM* Board mentioned the events of 9/11 as an added factor that contributed to the need for more employers to investigate in the workplace.²⁷⁸ The dissenters in *IBM* responded, somewhat tongue in cheek, stating, “[W]e would hope that the American workplace has not yet become a new front in the war on terrorism and that the Board would not be leading the charge, unbidden by other authorities.”²⁷⁹ The events of 9/11 hardly seem a valid excuse to take away a basic right from non-union employees but not from unionized employees.

VII. CONCLUSION

Section 7 applies to all employees, and the *Weingarten* right is actually quite limited in that employers maintain the right to refuse a witness by omitting the interview altogether. As union membership in the United States continues to drop,²⁸⁰ *Weingarten* rights for non-union employees become an increasingly important means for preserving fair process during an investigatory interview. *Weingarten* rights are not the equivalent of a right to counsel, as the dissent noted in *IBM*, but they do provide a “modest . . . measure of due process to workplace discipline”²⁸¹ that “militates against . . . unjust discipline. . . .”²⁸² Providing these rights equitably to union and non-union employees

276. *IBM*, 174 L.R.R.M. (BNA) at 1541.

277. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265 & n.10 (1975).

278. *IBM*, 174 L.R.R.M. (BNA) at 1541.

279. *Id.* at 1555 (Liebman, Member, dissenting).

280. *See supra* note 14 (showing the decline in union membership and discussing the need for *Weingarten* rights for non-union workers).

281. *IBM*, 174 L.R.R.M. (BNA) at 1559 (Liebman and Walsh, Members, dissenting).

282. *Id.* (quoting *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001)).

alike encourages a more complete and less biased development of the facts from which discipline might be meted out. A balanced investigatory process for all employees, a process where there is not such a large thumb weighing down the scale in favor of management, furthers the purposes of the NLRA by helping to avoid workplace disputes and labor unrest.